

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

ROBERT MORRIS,

Plaintiff,

VS.

Case No.: 2:14-cv-01998-GMN-CWH

## ORDER

GREEN TREE SERVICING, LLC, a  
Delaware Limited Liability Company;  
AMERICAN RELIABLE INSURANCE  
COMPANY d/b/a ASSURANT,

Defendants.

Pending before the Court is the Motion to Dismiss (ECF No. 45) filed by Defendant Green Tree Servicing, LLC (“Green Tree”).<sup>1</sup> Plaintiff Robert Morris (“Plaintiff”) filed a Response (ECF No. 49),<sup>2</sup> and Green Tree filed a Reply (ECF No. 51).

## I. BACKGROUND

This case arises out of the purchase of force-placed insurance (“FPI”) by Defendant Green Tree from Defendant ARIC. A thorough recitation of the facts can be found in the Court’s previous Order (ECF No. 37).

On July 8, 2015, the Court entered an Order (ECF No. 37), which granted in part and denied in part Green Tree's first Motion to Dismiss (ECF No. 16). Moreover, the Court also granted the Motion to Dismiss (ECF No. 10) filed by Defendant American Reliable Insurance

<sup>1</sup> The Court takes judicial notice of Exhibits A and B (ECF No. 45-1) to Green Tree's Motion to Dismiss. *See Mack v. S. Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Each of these documents is publicly recorded in the Clark County Recorder's office.

<sup>2</sup> The Court also takes judicial notice of Exhibits 1-3 (ECF No. 49-1–49-3) to Plaintiff’s Response. Each of these documents are referenced in the Complaint. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994).

Company (“ARIC”).<sup>3</sup> In the Order, the Court dismissed the following claims with prejudice: (1) accord and satisfaction; (2) violation of the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*; (3) violation of the Nevada Deceptive Trade Practice Act, NRS 598.0903 *et seq.*; (4) violation of the Nevada Unfair Lending Practices Act, NRS 598D.010 *et seq.*; (5) violation of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.*; and (6) statutory damages. (Order 28:9–12). Moreover, the Court dismissed the following claims without prejudice and with leave to amend: (1) breach of fiduciary duty; (2) accounting of funds; (3) conversion; (4) civil conspiracy; (5) RICO; (6) racketeering; (7) racketeering conspiracy; (8) violation of the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 *et seq.*; (9) wrongful foreclosure; (10) violation of the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*; (11) violation of NRS 107; and (12) violation of NRS 645F. (*Id.* 28:13–17). Finally, the Court denied Green Tree’s Motion to Dismiss as to the following claims: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; and (3) intentional misrepresentation. (*Id.* 28:19–20).

On July 22, 2015, Plaintiff filed his Second Amended Complaint asserting the following claims: (1) first breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) intentional misrepresentation; (4) second breach of contract; (5) conspiracy to defraud; (6) violations of the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 *et seq.*; (7) violation of NRS 645F; (8) RICO; (9) racketeering; and (10) racketeering conspiracy. (SAC ¶¶ 45–208, ECF No. 38). Shortly thereafter, Green Tree filed the instant Motion to Dismiss. (ECF No. 45).

## II. LEGAL STANDARD

Dismissal is appropriate under Rule 12(b)(6) where a pleader fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A pleading must give fair notice of a legally cognizable claim and the grounds on

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<sup>3</sup> ARIC was terminated from this case on August 31, 2015. (*See* ECF No. 50).

1 which it rests, and although a court must take all factual allegations as true, legal conclusions  
2 couched as a factual allegation are insufficient. *Twombly*, 550 U.S. at 555. Accordingly, Rule  
3 12(b)(6) requires “more than labels and conclusions, and a formulaic recitation of the elements  
4 of a cause of action will not do.” *Id.*

5 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,  
6 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556  
7 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555). “A claim has facial plausibility  
8 when the plaintiff pleads factual content that allows the court to draw the reasonable inference  
9 that the defendant is liable for the misconduct alleged.” *Id.* This standard “asks for more than a  
10 sheer possibility that a defendant has acted unlawfully.” *Id.*

11 “Generally, a district court may not consider any material beyond the pleadings in ruling  
12 on a Rule 12(b)(6) motion.” *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542,  
13 1555 n.19 (9th Cir. 1990). “However, material which is properly submitted as part of the  
14 complaint may be considered.” *Id.* Similarly, “documents whose contents are alleged in a  
15 complaint and whose authenticity no party questions, but which are not physically attached to  
16 the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss” without  
17 converting the motion to dismiss into a motion for summary judgment. *Branch v. Tunnell*, 14  
18 F.3d 449, 454 (9th Cir. 1994). On a motion to dismiss, a court may also take judicial notice of  
19 “matters of public record.” *Mack v. S. Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986).  
20 Otherwise, if a court considers materials outside of the pleadings, the motion to dismiss is  
21 converted into a motion for summary judgment. Fed. R. Civ. P. 12(d).

22 If the court grants a motion to dismiss for failure to state a claim, leave to amend should  
23 be granted unless it is clear that the deficiencies of the complaint cannot be cured by  
24 amendment. *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992). Pursuant  
25 to Rule 15(a), the court should “freely” give leave to amend “when justice so requires,” and in  
the absence of a reason such as “undue delay, bad faith or dilatory motive on the part of the

1 movant, repeated failure to cure deficiencies by amendments previously allowed, undue  
2 prejudice to the opposing party by virtue of allowance of the amendment, futility of the  
3 amendment, etc.” *Foman v. Davis*, 371 U.S. 178, 182 (1962).

### 4 **III. DISCUSSION**

5 Green Tree asserts that each cause of action pled by Plaintiff should be partially or fully  
6 dismissed for failure to state a claim. Accordingly, the Court will analyze each cause of action  
7 in turn.

#### 8 **A. Breach of Contract**

9 In his first cause of action, Plaintiff alleges that Green Tree breached the Deed of Trust  
10 by failing to apply Plaintiff’s mortgage payments to the principal balance of the Loan and by  
11 “cancelling Plaintiff’s homeowners’ insurance and refusing to use Plaintiff’s mortgage  
12 payments to pay premiums for homeowners’ insurance.” (SAC ¶¶ 52–53, ECF No. 38). In the  
13 previous Order, the Court held that, “inasmuch as Plaintiff’s breach of contract claim relies on  
14 Plaintiff’s allegations that Green Tree breached the Deed of Trust by failing to apply Plaintiff’s  
15 mortgage payments to the principal balance of the Loan, Plaintiff’s claim survives Green Tree’s  
16 Motion to Dismiss.” (Order, 8:5–8, ECF No. 37). However, the Court did not grant Plaintiff to  
17 amend this claim. Accordingly, this claim survives solely upon the allegation that Green Tree  
18 failed to apply Plaintiff’s mortgage payments to the principal balance of the Loan, and the  
19 Court hereby strikes the new additions added to this claim in the Second Amended Complaint.

#### 20 **B. Breach of the Implied Covenant of Good Faith and Fair Dealing**

21 Like the first cause of action, Plaintiff’s second cause of action alleges that Green Tree  
22 breached its duty of good faith and fair dealing. (SAC ¶¶ 56–67). Specifically, Plaintiff alleges  
23 that Green Tree breached the implied covenant of good faith and fair dealing by (1) “cancelling  
24 Plaintiff’s homeowners’ insurance, failing to pay homeowners insurance premiums on the  
25 Property, and thereafter purchasing force-placed insurance and charging Plaintiff for it,” (2)

1 “refusing to apply Plaintiff’s mortgage payments to the outstanding principal balance, making  
2 fraudulent representations regarding the purchase of force-placed insurance, attempting to  
3 extort funds from Plaintiff that were not due and owing, and refusing to comply with the terms  
4 of the valid agreement that it voluntarily entered into,” (3) “refusing to reinstate Plaintiff’s  
5 homeowners insurance after they cancelled it,” (4) “not disclosing that they had cancelled  
6 Plaintiff’s homeowners insurance,” (4) “purchasing force-placed insurance and receiving a  
7 commission from American Reliable when it was Green Tree that made the purchase of  
8 insurance necessary,” (5) “backdating the force-placed insurance it purchased to cover time  
9 periods for which there would have been insurance had they fulfilled the terms of their contract  
10 with Plaintiff,” and (6) “failing to disgorge (through either credit or refund) payments made  
11 with Plaintiff’s Monthly Escrow Deposit that were earmarked for homeowners’ insurance but  
12 not used for homeowners’ insurance.” (*Id.* ¶¶ 58–63).

13 Plaintiff amended this claim with new allegations not contained in its First Amended  
14 Complaint. However, in the previous Order, the Court did not grant Plaintiff leave to amend  
15 this claim. Accordingly, the Court hereby strikes the new additions added to this claim in the  
16 Second Amended Complaint.

17 **C. Intentional Misrepresentation**

18 Plaintiff’s third cause of action alleges a claim of intentional misrepresentation against  
19 Green Tree. (SAC ¶¶ 68–78). Like Plaintiff’s first breach of contract and breach of the implied  
20 covenant of good faith and fair dealing claims, the Court did not grant Plaintiff leave to amend  
21 his intentional misrepresentation claims. However, Plaintiff’s Second Amended Complaint  
22 contains allegations related to intentional misrepresentation that were not alleged in his First  
23 Amended Complaint. Accordingly, the Court hereby strikes the new additions added to this  
24 claim in the Second Amended Complaint.

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#### **D. Breach of Contract**

Plaintiff's fourth cause of action alleges a second claim of breach of contract. (SAC ¶¶ 79–85). To state a claim for breach of contract in Nevada, the plaintiff must allege: (1) the existence of a valid agreement between the plaintiff and the defendant; (2) a breach by the defendant; and (3) damages as a result of the breach. *Calloway v. City of Reno*, 993 P.2d 1259 (Nev. 2000).

Plaintiff alleges that the parties entered into a valid agreement on September 17, 2012. (SAC ¶¶ 81–82). Moreover, Plaintiff alleges that Green Tree breached this agreement, causing damages. (*Id.* ¶¶ 83–84). Taking these allegations as true and in a light most favorable to Plaintiff, the Court finds that Plaintiff sufficiently alleges a breach of contract claim. While the parties argue over issues related to pre-existing duties under the Deed of Trust and excused performance due to material breach, these issues are not amenable to resolution at the motion to dismiss stage. (*See* Mot. Dismiss 9:3–24; Response 12:10–13:22). Accordingly, the Court denies Green Tree's Motion to Dismiss as to this claim.

#### **E. Conspiracy to Defraud**

Plaintiff's fifth cause of action alleges a claim of conspiracy to defraud against Green Tree. (SAC ¶¶ 86–104). In his Response, Plaintiff did not oppose dismissal of this claim. (Response 19:11–12). Accordingly, the Court dismisses this claim with prejudice.

#### **F. Violation of the Real Estate Settlement Procedures Act (RESPA)**

Plaintiff's sixth cause of action alleges a claim of violation of the Real Estate Settlement Procedures Act ("RESPA") against Green Tree. (SAC ¶¶ 105–12). Specifically, Plaintiff alleges that Green Tree violated the following provisions: (1) "12 U.S.C. § 1205(g) by failing to make payments from the escrow account for insurance premiums in a timely manner as such payments became due;" (2) "12 U.S.C. § 2605(m) by imposing charges related to force-placed insurance that were not bona fide and reasonable;" (3) "12 U.S.C. § 2605(e) by failing to

properly respond to Plaintiff's qualified written request;" (4) "12 U.S.C. § 2607(a), when American Reliable gave and Green Tree accepted a fee, kickback, or thing of value when Green Tree purchased force-placed insurance from American Reliable." (SAC ¶¶ 108–11).

Section 2605(g) provides as follows:

If the terms of any federally related mortgage loan require the borrower to make payments to the servicer of the loan for deposit into an escrow account for the purpose of assuring payment of taxes, insurance premiums, and other charges with respect to the property, the servicer shall make payments from the escrow account for such taxes, insurance premiums, and other charges in a timely manner as such payments become due.

Accordingly, Plaintiff alleges that Green Tree violated this section "by failing to make payments from the escrow account for insurance premiums in a timely manner as such payments became due." (SAC ¶ 108). However, the Court already dismissed similar allegations in its previous Order. (Order 6:24–7:3 ("Because Plaintiff did not maintain homeowners' insurance on November 1, 2011, when Green Tree became the servicer of the mortgage, there was no insurance premium that Green Tree could have made payments towards pursuant to Section 3 of the Deed of Trust. Therefore, the allegations of the Amended Complaint demonstrate that Green Tree could not have breached the Deed of Trust by failing to pay homeowners' insurance premiums.")). Therefore, the Court dismisses this claim with prejudice inasmuch as it pertains to section 2605(g).

As to section 2605(m), Plaintiff does not dispute dismissal of this claim as to section 2605(m). (Response 14:14–16). Accordingly, the Court also dismisses this claim with prejudice inasmuch as it pertains to section 2605(m).

Section 2605(e) governs the "[d]uty of [a] loan servicer to respond to borrower inquiries." 12 U.S.C. § 2605(e). Generally, "[i]f any servicer of a federally related mortgage loan receives a qualified written request ... for information relating to the servicing of such loan, the servicer shall provide a written response acknowledging receipt of the correspondence

1 within 5 days ... unless the action requested is taken within such period.” § 2605(e)(1)(A). A  
 2 “qualified written request” is:

3 a written correspondence ... that ... includes, or otherwise enables  
 4 the servicer to identify, the name and account of the borrower; and  
 5 ... includes a statement of the reasons for the belief of the borrower,  
 6 to the extent applicable, that the account is in error or provides  
 sufficient detail to the servicer regarding other information sought by  
 the borrower.

7 § 2605(e)(1)(B), (B)(i)–(ii).

8 Plaintiff offers scant allegations to support his RESPA claim under section 2605(e).  
 9 Specifically, Plaintiff merely alleges that “Green Tree violated RESPA, 12 U.S.C. § 2605(e) by  
 10 failing to properly respond to Plaintiff’s qualified written request.” (SAC ¶ 110). Apart from  
 11 this conclusory allegation, Plaintiff alleges no more facts demonstrating that he is entitled to  
 12 relief under this section. Accordingly, the Court dismisses this claim with prejudice inasmuch  
 13 as it pertains to section 2605(e).

14 Section 2607(a) provides that “[n]o person shall give and no person shall accept any fee,  
 15 kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that  
 16 business incident to or a part of a real estate settlement service involving a federally related  
 17 mortgage loan shall be referred to any person.” However, “[s]ettlement service means any  
 18 service provided in connection with a prospective or actual settlement[.]” 24 C.F.R. § 3500.2.  
 19 Moreover, settlement means “the process of executing legally binding documents regarding a  
 20 lien on property that is subject to a federally related mortgage loan. This process may also be  
 21 called ‘closing’ or ‘escrow’ in different jurisdictions.” *Id.* Green Tree’s placement of hazard  
 22 insurance was performed years after Plaintiff closed on his home. RESPA “does not focus on  
 23 post-settlement fees paid by mortgagors after they have purchased their houses.” *Bloom v.*  
 24 *Martin*, 77 F.3d 318, 321 (9th Cir. 1996); *Molosky v. Washington Mut., Inc.*, 664 F.3d 109, 118  
 25 (6th Cir. 2011) (Section 2607 “does not apply to fees assessed after a property’s settlement”).

Accordingly, because Plaintiff has had multiple attempts to sufficiently allege this claim, the Court dismisses Plaintiff's RESPA claim in its entirety with prejudice.

### **G. Violation of NRS 645F**

Plaintiff's seventh cause of action alleges violations of NRS 645F against Green Tree. (SAC ¶¶ 113–18). Specifically, Plaintiff alleges that Green Tree “violated Nevada’s statute regarding mortgage lenders and servicers by charging for fees outside the scope of the Contract, in violation of NRS 645F.400(1)(a)–(b),” “violated Nevada’s statute regarding mortgage lenders and servicers by receiving consideration from a third party in connection with a covered service provided to Plaintiff that was not fully disclosed to the homeowner, in violation of NRS 645F.400(1)(d),” and “violated Nevada’s statute regarding mortgage lenders and servicers by misrepresenting aspects of covered service, in violation of NRS 645F.400(1)(g).” (*Id.* ¶¶ 115–17). NRS 645F.380 provides that the provisions of NRS 645F.300 to 645F.450 do not apply to:

Any person doing business under the laws of this State or of the United States relating to banks, trust companies, savings and loan associations, industrial loan and thrift companies, regulated lenders, credit unions, insurance companies, or a mortgagee which is a United States Department of Housing and Urban Development approved mortgagee and any subsidiary or affiliate of those persons, and any agent or employee of those persons while engaged in the business of those persons.

Because Green Tree falls under this exception, NRS 645F.400 does not apply to Green Tree. Accordingly, the Court dismisses Plaintiff's claim for violations of NRS 645F with prejudice.

### **H. RICO**

Plaintiff's eighth cause of action alleges a claim of civil RICO against Green Tree predicated on mail fraud, wire fraud, and extortion. (SAC ¶¶ 119–46). “To state a civil RICO claim, plaintiffs must allege (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (5) causing injury to plaintiffs’ ‘business or property.’” *Ove v. Gwinn*, 264 F.3d 817, 825 (9th Cir. 2001) (citing 18 U.S.C. § 1964(c)). In the previous Order, the Court

1 held that “Plaintiff may not continue to rely on backdating or kickback theories to support the  
2 predicate acts of mail or wire fraud.” (Order 21:18–19). Here, Plaintiff continues to rely upon a  
3 kickback theory to support the predicate acts of mail or wire fraud. Although Plaintiff  
4 additionally pleads allegations that Green Tree cancelled Plaintiff’s insurance policy upon  
5 acquisition of the Loan, the Court finds that these additional allegations do not support a RICO  
6 claim. Accordingly, because Plaintiff has had multiple attempts to sufficiently allege this  
7 claim, the Court dismisses Plaintiff’s RICO claim with prejudice.

### 8 **I. Racketeering**

9 Plaintiff’s ninth cause of action alleges a racketeering claim under state law against  
10 Green Tree. (SAC ¶¶ 147–87). Specifically, Plaintiff predicates his racketeering claim on the  
11 predicate acts of fraud, grand larceny, and embezzlement. (*Id.* ¶¶ 150–87).

12 As to the predicate act of fraud, Plaintiff bases this claim on the same kickback theory  
13 the Court held was insufficient to support his RICO claim based on fraud. Accordingly, the  
14 Court finds that Plaintiff’s allegations related to the predicate act of fraud to support his  
15 racketeering claim fails.

16 As to the predicate act of grand larceny, Plaintiff alleges that Green Tree “intentionally  
17 stole, took and carried away, led away, or drove away personal goods and/or property at \$650  
18 or more, including \$5,640.01 intended to settle the matter, and years’ worth of escrow  
19 payments intended for homeowners insurance.” (*Id.* ¶ 169). These meager allegations are  
20 conclusory at best and fail to support a grand larceny claim.

21 As to the predicate act of embezzlement, Plaintiff alleges that Green Tree was “entrusted  
22 with Plaintiff’s property,” “converted said property to their own use with the intent to steal it or  
23 to defraud Plaintiff thereof,” and “appropriated said property for a use other than that for which  
24 it was entrusted.” (*Id.* ¶¶ 171–73). These allegations appear to be predicated upon the same  
25 kickback theory that this Court has rejected. Therefore, Plaintiff has failed to sufficiently

1 allege a racketeering claim. Accordingly, because Plaintiff has had multiple attempts to  
 2 sufficiently allege this claim, the Court dismisses this claim with prejudice.

### 3 **J. Racketeering Conspiracy**

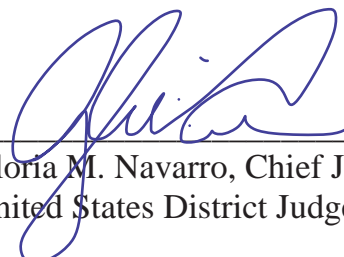
4 Plaintiff's tenth cause of action alleges a claim of racketeering conspiracy against Green  
 5 Tree. (SAC ¶¶ 188–208). In his Response, Plaintiff did not oppose dismissal of this claim.  
 6 (Response 19:11–12). Accordingly, the Court dismisses this claim with prejudice.

### 7 **IV. CONCLUSION**

8 **IT IS HEREBY ORDERED** that Defendant Green Tree's Motion to Dismiss (ECF No.  
 9 45) is **GRANTED in part** and **DENIED in part**. The following claims are dismissed with  
 10 prejudice: (1) conspiracy to defraud; (2) violation of the Real Estate Settlement Procedures Act,  
 11 12 U.S.C. § 2601 *et seq.*; (3) violation of NRS 645F; (4) RICO; (5) racketeering; and (6)  
 12 racketeering conspiracy. Moreover, because the Court did not grant Plaintiff leave to amend  
 13 the following claims, new allegations not contained in the First Amended Complaint but  
 14 contained in the Second Amended Complaint are hereby stricken as to the following claims: (1)  
 15 first breach of contract; (2) breach of the implied covenant of good faith and fair dealing; and  
 16 (3) intentional misrepresentation. Furthermore, Defendant Green Tree's Motion to Dismiss is  
 17 denied with respect to the second breach of contract claim. Accordingly, the following claims  
 18 remain: (1) first breach of contract; (2) breach of the implied covenant of good faith and fair  
 19 dealing; (3) intentional misrepresentation; and (4) second breach of contract.

20 **DATED** this 24 day of November, 2015.

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Gloria M. Navarro, Chief Judge  
 United States District Judge